Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

BENDER SHIPBUILDING & REPAIR COMPANY, INC.,

Petitioner,

v.

ANTHONY JARRELL,

Respondent.

Petition For Writ Of Certiorari
To The Alabama Court Of Civil Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Notwithstanding a contract provision stating otherwise, where an employee works exclusively under the direction and control of the borrowing employer, performs solely the work of the borrowing employer, acquiesces to his new temporary work situation, received tools from the borrowing employer for approximately five days, and whose borrowing employer had the right to terminate his services and the obligation to pay the borrowing employee, should this employee be considered a borrowed employee for exclusivity of remedy purposes under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905 (1988).

LIST OF PARTIES

The parties to the proceedings below were Petitioner Bender Shipbuilding & Repair Company, Inc. and Anthony Jarrell.

RULE 29.6 DISCLOSURE

Petitioner Bender Shipbuilding & Repair Company, Inc., has no parent company or non-wholly owned subsidiary companies.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

RULE 29.6 DISCLOSURE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

GROUNDS OF JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF CASE 3

FACTS 6

REASONS FOR GRANTING THE WRIT 8

The Alabama Court of Civil Appeals' determination that Anthony Jarrell was not a borrowed servant for exclusivity of remedy purposes under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-905 (1988) squarely conflicts with the decisions of the United States Courts of Appeals 8

The *Ruiz* Factors 11

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Billizon v. Conoco, Inc., 993 F.2d 104 (5th Cir. 1993) 8, 13, 16, 17

Brown v. Union Oil Co., 984 F.2d 674 (5th Cir. 1993) ..5, 12

Canty v. A. Bottacchi, S.A. de Navegacion, 849 F. Supp. 1552 (S.D. Fla. 1994) 10, 14

Capps v. N.L. Bariod-NL Indus., Inc., 784 F.2d 615 (5th Cir. 1986), *cert. denied*, 479 U.S. 838 (1986) 10, 14, 15, 16, 19

Champagne v. Penrod Drilling Co., 459 F.2d 1042 (5th Cir. 1972)..... 14

Gaudet v. Exxon Corp., 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1973) 9, 10

Huff v. Marine Tank Testing Corp., 631 F.2d 1140 (4th Cir. 1980)..... 9

Lott v. Moss Point Marine, Inc., 785 F. Supp. 600 (S.D. Miss.1991) 9

Melancon v. Amoco Prod. Co., 834 F.2d 1238 (5th Cir. 1988)..... 4, 9, 10, 12, 15, 17

Peter v. Hess Oil Virgin Islands Corp., 903 F.2d 935 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1990) 9

Rosetti v. Avondale Shipyards, Inc., 821 F.2d 1083 (5th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1987) 10

Ruiz v. Shell Oil Co., 413 F.2d 310 (5th Cir. 1969) 5, 9, 11, 18, 19

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Ala. Code § 12-2-7(6) (1975) 4

33 U.S.C. §§ 901-905 (1988) 2, 3, 7, 8, 19

RULES

Rule 39, Ala.R.App.P. 5

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Alabama Court of Civil Appeals, entered in the within proceeding on January 19, 1996. The Supreme Court of Alabama quashed the writ of certiorari on September 27, 1996.

OPINIONS BELOW

The Order of the Circuit Court of Mobile County, Alabama, granting Petitioner's Motion for Summary Judgment is not reported. It is reprinted in the Appendix to this petition at App. 15. The Opinion of the Alabama Court of Civil Appeals which gives rise to this petition is not yet reported. Of the five person court, one justice concurred only in the result and two justices dissented. The majority opinion and the dissenting opinions are reprinted in the Appendix to this petition at App. 1. That court subsequently denied Bender Shipbuilding & Repair Company's Application for Rehearing. No opinion was written on rehearing. The Court of Civil Appeals' decision is reprinted in the Appendix to this petition at App. 14. The Supreme Court of Alabama did not address the merits of this case, but rather quashed the writ of certiorari as improvidently granted on September 27, 1996. This opinion is not yet reported. It is reprinted in the Appendix to this petition at App. 23.

GROUNDS OF JURISDICTION

On September 27, 1996, the Supreme Court of Alabama issued its opinion quashing the writ of certiorari as improvidently granted. (App. 23.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

Section 905 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901(a)(1988), provides as follows:

> (a) **Employer liability; failure of employer to secure payment of compensation**
>
> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damage on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the

> employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

STATEMENT OF CASE

Anthony Jarrell (hereinafter "Jarrell") was injured when a scaffolding on which he was working suddenly collapsed at a dry dock facility owned and operated by Bender Shipbuilding & Repair Company (hereinafter "Bender"). Jarrell sued Bender in Alabama Circuit Court, alleging that Bender had negligently failed to maintain or inspect the scaffolding. Bender moved for summary judgment, arguing that Jarrell was a "borrowed employee" under 33 U.S.C. § 905(a), the exclusivity provision of the Longshore and Harbor Workers' Compensation Act (LHWCA), and could not maintain a tort action against Bender.[1]

On May 1, 1995, the Circuit Court of Mobile County, Alabama, granted Bender's motion for summary judgment, finding that Jarrell was Bender's "borrowed employee" under both federal and state law and, therefore, that Bender was immune from tort liability. The trial court entered the following conclusion of law:

> Consistent with the Court's previous findings of fact, the Court hereby concludes as a

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[1] Bender also argued that Jarrell was Bender's "borrowed employee" under the Alabama Workers' Compensation Act and thus barred from recovery for alleged compensatory damages.

> matter of law that Bender had control over Jarrell and the work he was performing; that it was Bender's work being performed by Jarrell at the time of the accident; that there was an agreement between Bender and Wilks in which Wilks agreed to recruit and provide temporary employees to Bender; that Jarrell acquiesced in the work situation; that Wilks did not terminate its relationship with the employee while Jarrell was working at Bender; that, however, since the time of the injury, Jarrell is no longer employed with Wilks & Associates; that although Jarrell furnished most of his tools, Bender supplied some tools and equipment as well as the place of performance; that although the length of employment was not over a considerable length of time, this was fortuitous due to the injury (the Court therefore concludes that this factor is neutral with respect to the borrowed servant issue); that although Bender did not have the right to terminate Jarrell's employment with Wilks, Bender had the right to terminate Jarrell's services for Bender which satisfies this factor; and that Bender had the obligation to pay the employee, Jarrell, via Wilks & Associates. See, specifically *Melancon*, supra." (C. 487-88.)

(App. at 20, 21.)

Jarrell appealed to the Supreme Court of Alabama, which deflected his appeal to the Court of Civil Appeals pursuant to Ala. Code 1975 § 12-2-7(6). The Alabama Court of Civil Appeals reversed the summary judgment on January 19, 1996, finding, correctly, that federal law determined Jarrell's status as a borrowed servant under the LHWCA and applicable to case authorities, but also finding, incorrectly, that there were disputed issues of

material fact as to several of the nine elements of the borrowed employee test as set forth in *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969):

> In this case, there are disputed issues of material fact as to several of the nine elements of the borrowed employee test. Factors three and seven are clearly in Jarrell's favor and several of the other factors raise factual issues.
>
> The fact that factor three favors Jarrell does not automatically preclude a summary judgment under federal case law *if* the remaining factors *overwhelmingly* point to borrowed employee status. *Brown v. Union Oil Co. of California*, 984 F.2d at 678. However, we hold that the remaining factors do not overwhelmingly point to a borrowed employee status for Jarrell. Factor seven weighs heavily in Jarrell's favor and, at the very least, there are factual disputes concerning several of the other factors. The trial court erred in entering summary judgment in favor of Bender.

(App. at 10.)

Two justices dissented, and one concurred only in the result. (App. at 10-13.) Bender filed an application for rehearing which was overruled on February 23, 1996. (App. at 14.)

Bender subsequently petitioned the Supreme Court of Alabama for a Writ of Certiorari to issue to the Court of Civil Appeals under Rule 39, Ala.R.App.P. On September 27, 1996, the Supreme Court of Alabama quashed the writ of certiorari as improvidently granted, with four justices dissenting. (App. at 23.)

FACTS

On June 17, 1991, Wilks & Associates (hereinafter "Wilks"), a temporary employment service, and Bender entered into an agreement in which Wilks agreed to recruit and provide temporary employees to Bender. On June 24, 1991, Jarrell, a Mississippi resident, applied for employment with Wilks. It was determined by Wilks that Jarrell met initial Bender criteria needed for a shipfitting position at Bender and Jarrell was sent to Bender for an interview and testing to determine if Bender wanted to hire Jarrell. Jarrell was found acceptable to Bender and began working at Bender on July 1, 1991, as a shipfitter. (C. 236-39.)[2]

On July 6, 1991, Jarrell was injured when a scaffolding upon which he was working allegedly collapsed. At the time of the accident, Jarrell was working in the course of his employment and on behalf of Bender on Bender's premises. On July 7, 1991, Jarrell reported his injury to Wilks. (C. 236-39.)

During the time Jarrell worked for Bender, which was July 1, 1991 through July 6, 1991, Jarrell worked on Bender property and was controlled by Bender supervisors, primarily Mr. Dennis Mixon. (C. 427.) Bender told Jarrell what to do, when to do it, where to do it, and how to do it. (*Id.*) During this time, Jarrell was not under the direct control of any Wilks employee. (C. 236-39.) Jarrell did not perform work of or for Wilks; was not furnished tools by Wilks; never complained to anyone at Wilks

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[2] "C" refers to the certified record in the Alabama Court of Civil Appeals.

about his work at Bender; never asked anyone at Wilks to be transferred from Bender to any other location; was not employed at Bender until Bender accepted him into its work force; did not become a Wilks employee until Wilks received word from Bender that Bender had hired him; and did not work for any other customer of Wilks during the period of time he worked for Bender. (*Id.*)

Jarrell was paid an hourly wage set by Bender for his work at Bender, and was also paid a per diem as determined by Bender. Bender maintained Jarrell's time records to determine how many hours for which to pay him. Bender then submitted the time report to Wilks who in turn issued Jarrell's pay check. Jarrell's pay check was drawn on an account in the name of Wilks, and Wilks delivered Jarrell's pay check to Bender for delivery by a representative of Bender to Jarrell. (*Id.*)

Pursuant to the agreement between Wilks and Bender, Bender paid Wilks for Jarrell's work at the rate of $10.25 per hour plus a mark-up of 1.4% on straight time and 1.8% on overtime. Also, pursuant to their agreement, Wilks paid FICA, USI, FUI, worker's compensation policy premiums, including Longshore and Harbor Worker's Compensation Act coverage, and general liability insurance premiums *out of the fee paid by Bender*. (*Id.*) In return, Bender was provided a waiver of subrogation *and* was named an additional insured under Jarrell's Longshore and Harbor Worker's Compensation policy (pursuant to the LHWCA 33 U.S.C. § 901 (1988)). (C. 241.)

The premiums paid by Wilks for a worker's compensation policy, which included Longshore and Harbor Worker's Compensation Act coverage, were based in part

on the fact that Bender was a shipyard engaged in maritime work and their premium rate applicable for maritime crafts such as a shipfitter. Pursuant to the agreement between Wilks and Bender, Wilks provided Bender with a certificate of insurance evidencing the purchase of worker's compensation and longshoreman harbor worker's compensation coverage. A factor considered in the "mark-up" to be paid by Bender to Wilks was the cost of this insurance coverage. (*Id.*) To date, Jarrell has received $156,224.60 in longshoreman's and worker's compensation.

At the time that Jarrell was working for Bender, Bender retained the absolute right to determine whether or not to allow Jarrell to work at Bender when he was sent there by Wilks, and Bender further retained the right to terminate the services of Jarrell at Bender at anytime. There were no restrictions whatsoever placed on Jarrell's work at Bender by Wilks. (*Id.*)

REASONS FOR GRANTING THE WRIT

The Alabama Court of Civil Appeals' determination that Anthony Jarrell was not a borrowed servant for exclusivity of remedy purposes under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-905 (1988) squarely conflicts with the decisions of the United States Courts of Appeals.

The principal question at issue in this case is whether Jarrell was a "borrowed servant" at the time of his injury. Under federal law analysis, the question of borrowed employee status in this case is a question of law for the court to determine. *Billizon v. Conoco, Inc.*, 993 F.2d 104,

105 (5th Cir. 1993); *Lott v. Moss Point Marine, Inc.*, 785 F. Supp. 600, 602 (S.D. Miss. 1991); *Melancon v. Amoco Prod. Co.*, 834 F.2d 1238, 1244 (5th Cir. 1988); *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 314 (5th Cir. 1969). This is true because the borrowed employee determination concerns not only the facts but the implications to be drawn from the facts. *Gaudet v. Exxon Corp.*, 562 F.2d 351, 358 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). If Jarrell is a borrowed servant under the circumstances herein, his exclusive remedy would be for workers' compensation rather than for damages in tort. 33 U.S.C. § 905(a) (1988).

The trial court held, and the Alabama Court of Civil Appeals agreed, that the analysis of whether Jarrell was a borrowed employee for purposes of applying the exclusivity of remedy provisions under the LHWCA is guided by the nine factors as set forth in *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969).[3]

The *Ruiz* factors are as follows:

(1) Who has control over the employee and the work he is performing beyond a mere suggestion of details or cooperation?

(2) Whose work is being performed?

(3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?

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[3] Although the Eleventh Circuit has not addressed the borrowed servant doctrine under the LHWCA, both the Third and Fourth Circuits have, and both have recognized the *Ruiz* factors. *See Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 942 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1990), *Huff v. Marine Tank Testing Corp.*, 631 F.2d 1140, 1143-1144 (4th Cir. 1980).

(4) Did the employee acquiesce in the new work situation?

(5) Did the original employer terminate his relationship with the employee?

(6) Who furnished tools and the place for the performance of the work?

(7) Was the new employment over a considerable length of time?

(8) Who had the right to discharge the employee?

(9) Who has the obligation to pay the employee?

Id. Although none of these factors or any combination of them is decisive in determining the existence of a borrowed servant relationship, most federal (and state) courts have considered "the right to control" as the central factor of this analysis. *Canty v. A. Bottacchi, S.A. de Navegacion*, 849 F. Supp. 1552 (S.D. Fla. 1994) ("the first and most critical factor"); *Melancon v. Amoco Prod. Co.*, 834 F.2d 1238, 1245 (5th Cir. 1988) ("the central issue"); *Capps v. N. L. Baroid-NL Indus., Inc.*, 784 F.2d 615, 617 (5th Cir. 1986), *cert. denied*, 479 U.S. 838 (1986) ("The first and most important factor."); *Rosetti v. Avondale Shipyards, Inc.*, 821 F.2d 1083, 1085 (5th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1987). It is a balancing test: the court should balance the factors, and if the court concludes that they predominately weigh in favor of borrowed employment, then that should be its holding. *See Gaudet*, 562 F.2d at 356.

A review of the Alabama Court of Civil Appeals' opinion reveals that that court has taken quite a different

course. Rather than balancing the *Ruiz* factors, considering "right to control" as the critical issue, the Alabama Court of Civil Appeals gives more weight to a minority of factors in an effort to support its conclusion that a fact question exists as to Jarrell's status as a borrowed employee. This manipulation of the balancing test is wrong and is contrary to federal law.

This conflict will not end of its own accord; the unequivocal commitment of the Alabama courts to misapply the *Ruiz* factors is demonstrated by the Supreme Court of Alabama's failure to even accept this case for review by certiorari. Without guidance from this Court, the application of the balancing test as set forth in *Ruiz* will needlessly vary from jurisdiction to jurisdiction, directly frustrating the goal of uniform application of federal law and policy.

THE *RUIZ* FACTORS

1. Who had control over Mr. Jarrell and the work he was performing beyond a mere suggestion of details or cooperation?

The trial court and the Alabama Court of Civil Appeals correctly determined that the undisputed record in this case was that Bender had control over Jarrell and the work he was performing beyond a mere suggestion of details or cooperation. (App. 6, 20.) The relationship was clearly one of direction by Bender and subordination by Jarrell – in short: *control.*

2. Whose work was being performed?

The record is clear and Jarrell admits that he performed Bender's work, providing a direct benefit to Bender. The trial court and the Court of Civil Appeals held that this factor weighed in favor of Bender. (App. 6, 20.)

3. Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?

Yes; Bender and Wilks & Associates entered into an agreement in which Wilks agreed to recruit and provide temporary employees to Bender. (C. 350.) The agreement is only one paragraph long and simply states in part that "all employees supplied to Bender by Wilks & Associates are employees of Wilks & Associates only. . . . " (*Id.*) (App. 7, 21.)

The Alabama Court of Civil Appeals held that this agreement "would support a finding that Jarrell was not Bender's borrowed employee." (App. 7.) However, that court, citing to *Melancon*, recognized that "obviously parties to a contract cannot automatically prevent a legal status like 'borrowed employee' from arising merely by saying in a provision in their contract that it cannot arise. 834 F.2d at 1245." (App. 7.)

The Court of Civil Appeals further noted that the terms of the contract would not automatically prevent summary judgment "if the remaining borrowed employee factors *overwhelmingly* point to borrowed employee status." (App. 7.) *See Brown v. Union Oil Co.*, 984 F.2d 674,

678, n.5 (5th Cir. 1993); *Billizon v. Conoco, Inc.*, 993 F.2d 104, 106 (5th Cir. 1993). To conclude otherwise would place form over substance, which is essentially the basis of Jarrell's argument in favor of reversal.

The *Billizon* opinion presents facts on point with the instant appeal. 993 F.2d 104. There, the Fifth Circuit held that the plaintiff, an injured offshore oil platform worker, was a borrowed employee as a matter of law notwithstanding the fact that the contract between the original employer (C & D Marine Contractors) and borrowing employer (Conoco) provided that employees of the original employer were not employees of the borrowing employer. The court examined the facts of the case and found that Conoco supervised the worker, provided the place for performance, told the worker what the work required and, although recognizing that Conoco did not have the right to terminate the worker's employment with C & D, that Conoco did have the right to terminate the worker's services with it. The worker's best argument, like Jarrell's here, centered on factor three, which pertains to contract language. Assuming that factor weighed against borrowed servant status, the *Billizon* court still found that contract language insufficient to overcome the facts of the case establishing the other factors, just as the trial court correctly concluded here.

In this case, the contract provision, if assumed to weigh against borrowed servant status, is insufficient given the weight of the other factors to overcome a clear finding of borrowed servant status.

4. Did Jarrell acquiesce in the work situation?

Although pre-injury working periods as short as one day have supported findings of employee acquiescence, *Capps v. N.L. Bariod-NL Industries, Inc.*, 784 F.2d 615, 616 (5th Cir. 1986); *Champagne v. Penrod Drilling Co.*, 459 F.2d 1042 (5th Cir. 1972), the Alabama Court of Civil Appeals rejected these findings and determined that they could "not unequivocally say that Jarrell acquiesced in the Bender work situation." (App. 8.) The Court of Civil Appeals focused on the point that Jarrell had reported to work for Bender "for only five days before he was injured."

In *Capps*, the court stated that because the plaintiff worked for a company that loaned temporary employees, the plaintiff knew the temporary agency would send him into new work situations. "Thus, going into new work situations was [the plaintiffs'] work situation." *Id.* at 617. Consequently, when Jarrell went to work for the temporary service, he acquiesced to the fact that they would constantly send him into new work situations.

Similarly in *Canty v. A. Bottacchi, S.A. de Navegacion*, 849 F. Supp. 1552 (S.D. Fla. 1994), the court noted that Seaport was engaged in the business of hiring out cranes and crane operators to stevedoring companies. "Accordingly, the crane operators employed by Seaport are presumed to have acquiesced to this sort of work arrangement and to the inherent working conditions that arise from the nature of the stevedoring business." *Id.* at 1558.

Of course Jarrell acquiesced in the Bender work situation: He worked at and for Bender for almost an entire week. Jarrell interviewed for a shipfitting position for Bender, was not hired by Wilks until Bender hired him, went to work at Bender, worked on Bender property and was controlled by Bender supervisors. (C. 427.) In fact, Jarrell reported to Bender not only when told to do so but also on subsequent days leading up to his accident, clearly acquiescing in the work assignment. Jarrell never asked to be transferred from Bender to any other location and never complained to anyone at Wilks about his work for Bender. *See Melancon*, 834 F.2d 1246. This evidence supports the conclusion that Jarrell acknowledged and accepted the risks of his employment with Bender.

5. Did the original employer terminate his relationship with the employee?

Wilks did not "terminate" his relationship with Jarrell. However, the Court of Civil Appeals correctly noted that this factor does not require a lending employer to completely sever this relationship with the employee, "such a requirement would effectively eliminate the borrowed employee doctrine as there could never be two employers." (App. 9.) Rather, the focus is on the lending employer's relationship when the borrowing occurs. *Capps*, 784 F.2d at 618; *See Melancon*, 834 F.2d at 1246. The Court of Civil Appeals acknowledged that Wilks exercised no control over Jarrell while he worked for Bender. (App. 8.)

6. Who furnished tools and a place for the performance of the work?

The Court of Civil Appeals acknowledged that the place of performance for Jarrell's employment was on the Bender property. (App. 8.) The court also noted that the undisputed evidence in the record further demonstrates that any tools that Jarrell did not supply himself were supplied by Bender. (App. 8.)

7. Was the employment over a considerable length of time?

The trial court correctly concluded that this factor of limited time of employment is neutral with respect to the borrowed servant issue. (App. 21.) Curiously, the Court of Civil Appeals recognized and noted that the circuit court's conclusion is supported by federal case law on the issue. (App. 9.) However, the court concluded that "when taken together with all the other factors, including the contract between Wilks and Bender, it weighs heavily in favor of Jarrell." (App. 9.)

This is incorrect conclusion of law. This factor is significant *only* when the special employer employs the employee for a considerable length of time. *Capps*, 784 F.2d at 618. When the injury occurs *before* the employee has worked for the special employer for a considerable length of time, "the factor becomes a *neutral* assessment." *Id.* (Emphasis added) A neutral factor cannot "weigh heavily" in anyone's favor.

In *Billizon*, the plaintiff/employee made a similar argument to the Fifth Circuit. In that case, the employee

had worked for the special employer for more than three months. That court found the length of employment factor (#7) to be neutral because the employment was not considerable. The court found borrowed servant status on the injured employee, balancing factors 1, 2, 4, 5, 6, 8, and 9 which supported the borrowed employee status.

Factor seven in this case is similarly neutral because the length of employment was not considerable due to the fortuitous event of Jarrell's injury. The Court of Civil Appeals erred by holding otherwise.

8. Who has the right to discharge the plaintiff?

It is undisputed that Bender had the right to terminate Jarrell's services at Bender – both the trial court and the Court of Civil Appeals held that this factor weighed in favor of Bender ("This may be enough to satisfy this factor." App. 9.). (App. 21.) The issue is not termination of employment, but termination of services. Bender's right to terminate Jarrell's services satisfied this requirement. *See Melancon*, 834 F.2d at 1246; *Billizon*, 993 F.2d at 105; *Capps*, 784 F.2d at 618.

9. Who has the obligation to pay Jarrell?

Both the trial court and the Court of Civil Appeals correctly determined that Bender had the obligation to pay Jarrell. (App. 9, 21.) Bender paid Wilks for Jarrell's work at the rate of $10.25 per hour plus a mark-up of 1.4% on straight time and 1.8% on overtime; and Wilks in turn issued Jarrell a paycheck. That is the determinative issue in this matter. *See Melancon*, 834 F.2d at 1246.

CONCLUSION

If you were keeping score in this balancing test, the Alabama Court of Civil Appeals agreed with the circuit court that five of the nine *Ruiz* factors would tip the scales in favor of Bender, including the critical issue of control. The only disputed findings were as to factors 3 (agreement), 4 (acquiescence), 6 (tools and place of performance) and 7 (length of employment). Even putting aside that the scales are clearly tipping in favor of borrowed employee status, which the majority of the Alabama Court of Civil Appeals curiously overlooks, the court's findings as to the remaining disputed factors reject established federal law.

As to factor three, the Court of Civil Appeals' own opinion concedes that the agreement is not determinative, and if the remaining factors "overwhelmingly" point to borrowed employee status, then summary judgment is appropriate. Clearly, the majority of the remaining factors overwhelmingly support borrowed employee status, in order to find otherwise the Alabama Court of Civil Appeals has, in fact, held the agreement to be determinative.

As to factor four, the Court of Civil Appeals states that "Jarrell *may* have acquiesced in the Bender work situation." Other federal courts addressing this issue (at the very least) state that in temporary work situations where the time at the work site is limited, then this becomes a neutral factor. Many courts hold that when one works for a temporary service, they acquiesce to the fact that they are constantly sent into new work situations.

As to factor six, the Alabama Court of Civil Appeals states that Jarrell furnished "most" of his tools and noted that Bender supplied the remaining tools. It is undeniable that the place for performance of Jarrell's work was on Bender property. Thus, at the most, Bender and Jarrell split this factor, making it a neutral factor in this balancing test.

As to factor seven, although the court notes that the *Billizon* and *Brown* cases would support a determination that the length of Jarrell's employment is a neutral factor, the court rejects their guidance. *Capps v. N. L. Baroid-NL Indus., Inc.*, 784 F.2d at 68. Contrary to these federal cases, the court found that this factor "weighs heavily" in favor of Jarrell. As Justice Crawley so eloquently stated in his dissenting opinion, "I am at a loss to understand how a 'neutral' factor can 'weigh heavily'." (App. 12.)

A review of the foregoing clearly illustrates that the Alabama Court of Civil Appeals' determination that Anthony Jarrell was not a borrowed servant for exclusivity of remedy purposes under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-905 squarely conflicts with the decisions of other courts interpreting this statute. The *Ruiz* factors *overwhelmingly* weigh in favor of borrowed employee status.

Thus, the circuit court's summary judgment in favor of Bender was entirely appropriate in this case. Bender respectfully requests that after a preliminary examination

the Writ of Certiorari be granted on the basis that the Alabama Appellate Courts have misapplied federal law.

Respectfully submitted,

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ALABAMA
COURT OF CIVIL APPEALS
OCTOBER TERM, 1995-96

2940805

Anthony Jarrell

v.

Bender Shipbuilding & Repair Company, Inc.

Appeal from Mobile Circuit Court

(CV-93-002013)

MONROE, Judge

Anthony Jarrell was injured when he fell from a scaffolding while working at a drydock facility owned and operated by Bender Shipbuilding & Repair Company. Jarrell sued Bender, alleging that it had negligently failed to maintain or inspect the scaffolding. The trial court granted Bender's motion for summary judgment after determining that Jarrell was Bender's "borrowed employee" and, therefore, that Bender was immune from tort liability under 33 U.S.C. § 905(a), the exclusivity provision of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). Jarrell appealed; the Alabama Supreme Court deflected his appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975.

The record reflects that on June 17, 1991, Wilks and Associates (Wilks), a Mississippi employment service,

entered into an agreement with Bender, an Alabama corporation, to recruit and provide workers for Bender's drydock operations in Alabama. The agreement stated, in pertinent part, the following:

> "Wilks & Associates expressly recognizes and agrees that all employees supplied to Bender Shipbuilding & Repair Co., Inc. by Wilks & Associates are employees of Wilks & Associates only and Wilks & Associates agrees to be responsible for compliance with all employment laws (whether federal, state, or local) applicable to such employees."

Jarrell, a Mississippi resident, applied for employment with Wilks. Wilks determined that Jarrell met Bender's requirements for a shipfitter's job, and it sent Jarrell to Bender for an interview and testing. Bender found Jarrell acceptable, and Jarrell began work at Bender on July 1, 1991.

Bender paid Wilks for Jarrell's work at the rate of $10.25 per hour, plus a mark-up of 1.4% on straight time and 1.8% on overtime. Out of the mark-up, Wilks paid the Social Security and unemployment taxes attributable to Jarrell, plus general liability and workers' compensation (including LHWCA) insurance premiums. Bender maintained Jarrell's time records and submitted a time report to Wilks. Wilks then issued Jarrell's paycheck and delivered it to Bender. Pursuant to an agreement between Wilks and Bender, Wilks provided Bender with a certificate of insurance showing that it had procured workers' compensation and LHWCA coverage. The certificate reflects that Bender was an additional insured on the policy.

Five days after he began work at Bender, Jarrell was injured. He reported the injury to a Bender employee and was told by that employee to report the injury to Wilks. Wilks filed reports of the injury with both the Mississippi Workmen's Compensation Commission and the United States Department of Labor's Office of Workers' Compensation Programs. Jarrell received LHWCA benefits for his injury. After settling his longshoremen's compensation claim with Wilks's insurer, Jarrell sued Bender in Alabama.

The issue on appeal is whether the trial court erred by holding that, as a matter of law, Jarrell was barred by the LHWCA from maintaining a negligence action against Bender. Bender argues that because Jarrell received benefits under the LHWCA, federal law applies on the question whether Jarrell is a borrowed employee. Jarrell, on the other hand, maintains that Alabama law applies because the injury occurred in Alabama. The trial court determined that federal law applies; we agree. See *Lott v. Moss Point Marine, Inc.*, 785 F. Supp. 600, 602 (S.D. Miss. 1991).

In *Lott*, the district court determined that a worker's receipt of benefits under the LHWCA precluded him from maintaining a tort action against the owner of a shipyard where he was injured. The court held that because the worker was "currently receiving benefits pursuant to the LHWCA . . . federal law provides the rule of decision on the question of whether Lott is a borrowed employee." 785 F. Supp. at 602. Jarrell attempts to distinguish *Lott* on the basis that he has already settled his

compensation claim and is not currently receiving longshoremen's benefits. That is a distinction without a difference.

The exclusivity provision of the LHWCA is not dependent upon whether the injured longshoreman is currently receiving benefits. The LHWCA, at 33 U.S.C. § 905, precludes a personal injury action against any employer who complies with the LHWCA. Just as Ala. Code 1975, § 25-5-53, provides that workers' compensation benefits are the exclusive remedy for injuries received in a work-related accident, the LHWCA provides, in 33 U.S.C. § 905(a), that an injured worker may not maintain a tort action against his employer for any negligence of the employer giving rise to the injury; the injured worker's exclusive remedy is under the LHWCA. In *International Paper Co. v. Murray*, 490 So. 2d 1234 (Ala. Civ. App. 1985), aff'd in part, rev'd in part on other grounds, *Ex parte Murray*, 490 So. 2d 1238 (1986), this court noted:

> "The LHWCA was adopted in 1927 as a federal compensation plan for maritime workers, and was patterned after existing state workers' compensation laws. . . . The LHWCA is a workmen's compensation statute similar to our own, where employers have 'relinquished their defenses to tort actions in exchange for limited and predictable liability.' "

490 So. 2d at 1236 (quoting *Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs, United States Department of Labor*, 461 U.S. 624, 103 S. Ct. 2045, 76 L.Ed.2d 194 (1983)).

To determine whether a person has the status of a borrowed employee, the federal courts use the following nine-factor analysis, derived from *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969):

> "(1) Who had control over the employee and the work he was performing, beyond mere suggestion of details for cooperation?
>
> "(2) Whose work was being performed?
>
> "(3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?
>
> "(4) Did the employee acquiesce in the new work situation?
>
> "(5) Did the original employer terminate his relationship with the employee?
>
> "(6) Who furnished tools and place for performance?
>
> "(7) Was the new employment over a considerable length of time?
>
> "(8) Who had the right to discharge the employee?
>
> "(9) Who had the obligation to pay the employee?"

Gaudet v. Exxon Corp., 562 F.2d 351, 355 (5th Cir. 1977), cert. denied, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 414 (1978) (restating the factors discussed in *Ruiz*, 413 F.2d at 312-13).

With respect to the nine-factor test, the documentary evidence submitted on the motion for summary judgment in this case shows the following:

(1) *Bender had control over Jarrell and the work he was performing.* Jarrell admitted that he worked under the supervision of a Bender foreman. Although Jarrell knew how to do his job, in the sense that he was an experienced shipfitter, the Bender foreman told him what to do and when to do it. This factor supports the notion that Jarrell was Bender's borrowed employee. To paraphrase a statement of the Fifth Circuit Court of Appeals in *Melancon v. Amoco Production Co.*, 834 F.2d 1238 (5th Cir. 1988), a case that presented the same issue:

> "[Bender] clearly had control over [Jarrell] and his work: [Jarrell] took orders only from [Bender] personnel who told him what work to do, and when and where to do it. [Wilks] gave no instructions to [Jarrell] except to go to the [Bender site] and perform the work requested by [Bender] personnel. The fact that [Jarrell] had specialized [shipfitter's] skills he utilized in most of his work . . . does not bar a finding of 'borrowed employee' status."

Melancon, 834 F.2d at 1245.

(2) *Bender's work was being performed.* Jarrell was on Bender's premises doing Bender's work. Jarrell's argument that by doing Bender's work he was also doing the work of Wilks is unpersuasive. Wilks's business was to furnish employees to other companies, and Jarrell was not engaged in that business. See *Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615, 617 (5th Cir.), cert. denied, 479 U.S. 838, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986). Moreover, even if we accepted Jarrell's argument, it would not negate borrowed employee status, because the borrowed

employee concept clearly envisions that a worker may have two employers. *Id.*

(3) *There was an agreement, understanding, or meeting of the minds between Wilks and Bender.* The agreement recites that Jarrell was an "employee of Wilks & Associates only," and it would support a finding that Jarrell was not Bender's borrowed employee.

Analyzing a similar contract provision, the *Melancon* court noted that "[o]bviously parties to a contract cannot automatically prevent a legal status like 'borrowed employee' from arising merely by saying in a provision in their contract that it cannot arise." 834 F.2d at 1245. Instead, the court observed, "[t]he reality at the worksite and the parties' actions in carrying out a contract can impliedly modify, alter, or waive express contract provisions." *Id.*

In a recent borrowed-employee case, the Fifth Circuit Court of Appeals observed:

> "We recognize and reiterate that the terms of a contract and the related factual issues do not automatically prevent summary judgment or directed verdict. If the remaining borrowed employee factors *overwhelmingly* point to borrowed employee status, a summary judgment or direct[ed] verdict is appropriate."

Brown v. Union Oil Co. of California, 984 F.2d 674, 678, n.5 (5th Cir. 1993) (emphasis added) (citations omitted). See also *Billizon v. Conoco, Inc.*, 993 F.2d 104, 106 (5th Cir. 1993).

(4) *Jarrell may have acquiesced in the Bender work situation.* Jarrell knew when he applied for employment with

Wilks that he was being considered for a shipfitter's job at Bender. He was told that he met Bender's employment criteria and he was sent for an interview and testing at Bender's worksite. He had reported for work at Bender for only five days before he was injured. "The focus of this factor is whether the employee was aware of his work conditions and chose to continue working in them." *Brown v. Union Oil Co. of California,* 984 F.2d at 678. Although pre-injury working periods as short as one day have supported findings of employee acquiescence (see *Capps v. N.L. Baroid-NL Industries, Inc.,* 784 F.2d at 616), we cannot unequivocally say that Jarrell acquiesced in the Bender work situation.

(5) *Wilks did not terminate its relationship with Jarrell.* However, this factor does not "require[ ] a lending employer to completely sever his relationship with the employee. Such a requirement would effectively eliminate the borrowed employee doctrine as there could never be two employees [sic]." *Capps v. N.L. Baroid-NL Industries, Inc.,* 784 F.2d at 617-18. See also *Lott v. Moss Point Marine, Inc.,* 785 F. Supp. at 603. "The emphasis when considering this factor should focus on the lending employer's relationship with the employee while the borrowing occurs." *Capps v. N.L. Baroid-NL Industries, Inc.,* 784 F.2d at 618. Wilks exercised no control over Jarrell while he worked for Bender.

(6) *Who furnished tools and place for performance?* The evidence is undisputed that Jarrell furnished most of his own tools. Bender contends that the others he used were supplied by Bender. The place for performance of Jarrell's work was on Bender property.

(7) *Jarrell's employment with Bender was not over a considerable length of time.* Jarrell spent only five days working for Bender before his injury, and the record reveals that, even without the accident, he probably would have worked only three weeks for Bender. The trial court concluded that the time of employment was a "neutral" factor in the borrowed employee calculus. That conclusion is supported by federal case law on the issue. *See Billizon v. Conoco, Inc.*, 993 F.2d at 106; and *Brown v. Union Oil Co. of California*, 984 F.2d at 679. However, when taken together with all the other factors, including the contract between Wilks and Bender, it weighs heavily in favor of Jarrell.

(8) *Bender had the right to discharge Jarrell.* Bender had the right to discharge Jarrell from working at Bender, but it did not have the right to terminate Jarrell's employment with Wilks. This may be enough to satisfy this factor. *Billizon v. Conoco, Inc.*, 993 F.2d at 105; *Melancon v. Amoco Production Co.*, 834 F.2d at 1246; *Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d at 618.

(9) *Bender had the obligation to pay Jarrell.* Bender "furnished the funds from which [Wilks] paid [Jarrell], and this is the determinative inquiry for this factor." *Melancon v. Amoco Production Co.*, 834 F.2d at 1246. However, it should be noted that Wilks was the one liable to Jarrell for payment for work performed, not Bender.

The question of borrowed employee status is a question of law for the trial court to determine. *Billizon v. Conoco, Inc.*, 993 F.2d at 105. However, in some cases, factual disputes must be resolved before the court can

make its legal determination. *Id.* See *Melancon v. Amoco Production Co.*, 834 F.2d at 1245 n.13.

In this case, there are disputed issues of material fact as to several of the nine elements of the borrowed employee test. Factors three and seven are clearly in Jarrell's favor and several of the other factors raise factual issues.

The fact that factor three favors Jarrell does not automatically preclude a summary judgment under federal case law *if* the remaining factors *overwhelmingly* point to borrowed employee status. *Brown v. Union Oil Co. of California*, 984 F.2d at 678. However, we hold that the remaining factors do not overwhelmingly point to a borrowed employee status for Jarrell. Factor seven weighs heavily in Jarrell's favor and, at the very least, there are factual disputes concerning several of the other factors. The trial court erred in entering the summary judgment in favor of Bender. The judgment of the trial court is due to be reversed and the cause remanded.

REVERSED AND REMANDED.

Robertson, P.J., concurs.

Yates, J., concurs in the result.

Thigpen and Crawley, JJ., dissent.

THIGPEN, Judge, dissenting.

I dissent based upon the authority of *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969). It appears to me that the nine factor analysis leads to the conclusion that Jarrell was a "borrowed employee" and, therefore, his exclusive remedy was in the LHWCA. 33 U.S.C. § 905. Accordingly,

I would affirm the trial court's grant of summary judgment.

CRAWLEY, Judge, dissenting.

Regardless of the legal designation one applies to the relationship between Jarrell and Wilks, the practical reality of what occurred in this case is that Wilks acted as an employment agent or broker between Jarrell and Bender. Wilks placed Jarrell, an experienced shipfitter, with Bender, a shipbuilding and repair company. That practical reality should be central to deciding whether there are really any disputed issues of fact under each of the nine *Ruiz* factors.

The majority appears to agree that factors 1, 2, and 5 support borrowed employee status. It concedes that factor 3 (the employment contract naming Jarrell a Wilks employee only) is not determinative. That leaves factor 4 and factors 6-9 as areas in which the majority finds disputed questions of fact.

The majority concludes, for factor 4, supra at 8, only that Jarrell *may have* acquiesced in the Bender work situation. I think Jarrell's acquiescence is evidence as a matter of law. Jarrell had no expectation, when he applied with Wilks, that he would be doing the work of Wilks. Even the majority recognizes, supra at 7, that "Wilks's business was to furnish employees to other companies and Jarrell was not engaged in that business." To paraphrase our supreme court, "Jarrell applie[d] to [Wilks] *for the specific purpose of temporary placement with [Bender]* and thus necessarily agree[d] to a contract of hire with [Bender]." *Gaut v. Medrano*, 630 So. 2d 362, 366 (Ala. 1993) (emphasis

added). See also *Hicks v. Alabama Power Co.*, 623 So. 2d 1050, 1054 (Ala. 1993).

For factor 6, Wilks does not even contend that it furnished any of Jarrell's tools. This factor clearly supports borrowed employee status.

For factor 7, the trial court concluded that Jarrell's brief time of employment was a neutral factor. The majority finds that conclusion supported by relevant case law. Yet inexplicably, the majority determines that factor 7, "when taken together with all the other factors, *weighs heavily* in favor of Jarrell." (Emphasis added). I am at a loss to understand how a "neutral" factor can "weigh heavily."

On factor 8, the majority states, "Bender had the right to discharge Jarrell from working at Bender, but it did not have the right to terminate Jarrell's employment with Wilks. This *may be* enough to satisfy . . . factor [8]." That is a misstatement of the law. The three cases cited by the majority hold that it *is* enough to satisfy factor 8.

For factor 9, the majority states that Bender "furnished the funds from which [Wilks] paid [Jarrell], *and this is the determinative inquiry for this factor.*" The majority then recites an irrelevant circumstance. If the court has already answered the "determinative inquiry," then why mention – much less rely on – an irrelevant circumstance?

I dissent from the majority's reversal of this summary judgment because I am convinced that, of the nine *Ruiz* factors, only one supports Jarrell's contention that he was not a borrowed employee; one is neutral; and the other

seven overwhelmingly support Bender's argument that Jarrell was a borrowed employee.

February 23, 1996

THE COURT OF CIVIL APPEALS OF ALABAMA

RE: 2940805

Anthony Jarrell v. Bender Shipbuilding & Repair Company, Inc. (Appeal from Mobile County Circuit Court: CV-93-002013).

You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals:

Application for rehearing overruled. No opinion written on rehearing.

/s/ John H. Wilkerson, Jr.
John H. Wilkerson, Jr., Clerk
Court of Civil Appeals

Court of Civil Appeals
300 Dexter Avenue
Montgomery, AL 36104-3741
(334) 242-4093

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

ANTHONY JARRELL,	*	CIVIL ACTION
Plaintiff,	*	NUMBER:
	*	CV-93-002013
vs.	*	
BENDER SHIPBUILDING & REPAIR COMPANY & CORPORATION, et al.,	*	
Defendants.	*	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Court on defendant's, Bender Shipbuilding & Repair Company, Inc. (hereinafter "Bender") Motion for Summary Judgment. The Court, having considered Bender's motion, the evidence submitted in support thereof as well as Bender's brief; and the Court having duly considered the evidence filed in opposition to the motion by the plaintiff, Anthony Jarrell, including evidence and supporting brief; and the Court having further heard arguments of counsel and having considered applicable law does hereby make the following findings of fact and conclusions of law and hereby grants Bender's Motion for Summary judgment:

FINDINGS OF FACT

1. On June 17, 1991, Wilks & Associates (hereinafter "Wilks"), a temporary employment service, and Bender entered into an agreement in which Wilks agreed to recruit and provide temporary employees to Bender. The

agreement between Bender and Wilks stated, in part, as follows: "Wilks & Associates expressly recognizes and agrees that all employees supplied to Bender Shipbuilding & Repair Co., Inc., by Wilks & Associates are employees of Wilks & Associates only and Wilks & Associates agrees to be responsible for compliance with all employment laws (rather federal, state, or local) applicable to any such employees." On June 24, 1991, plaintiff, Anthony Jarrell (hereinafter "Jarrell") applied for employment with Wilks. Wilks determined that Jarrell met initial Bender criteria needed for a shipfitting position at Bender and Jarrell was sent to Bender for an interview and testing to determine if Bender wanted to hire Jarrell. Plaintiff was found acceptable to Bender and began working at Bender on July 1, 1991, as a shipfitter.

2. On July 6, 1991, Jarrell was injured when a scaffolding upon which he was working collapsed. At the time of the accident, Jarrell was working in the course of his employment and on behalf of Bender on Bender's premises.

3. During the time that plaintiff worked for Bender, which was July 1, 1991 through July 6, 1991, Jarrell worked on Bender's property and was controlled by Bender supervisors. Bender told plaintiff what to do, when to do it, where to do it and how to do it. During this time, Jarrell was not under the direct control of any Wilks' employee. Jarrell did not perform work of or for Wilks; was not furnished tools by Wilks; never complained to anyone at Wilks about his work at Bender; never asked anyone at Wilks to be transferred from Bender to any other location; was not employed at Bender until Bender accepted him into its work force; did

not become a Wilks' employee until Wilks received word from Bender that Bender had hired him; and did not work for any other customer of Wilks during the period of time he worked for Bender.

4. Jarrell was paid an hourly wage set by Bender for his work at Bender and was also paid a per diem as determined by Bender. Bender maintained Jarrell's time records to determine how many hours to pay Jarrell for. Bender then submitted the time report to Wilks who in turn issued Mr. Jarrell's pay check. Jarrell's pay check was drawn on an account in the name of Wilks and Wilks delivered Jarrell's pay check to Bender for delivery by a representative of Bender to Jarrell.

5. Pursuant to the agreement between Wilks and Bender, Bender paid Wilks for Jarrell's work at the rate of $10.25 per hour plus a mark-up of 1.4% on straight time and 1.8% on overtime. Pursuant to their agreement, Wilks paid FICA, SUSI, FUI, workers compensation policy premium, including Longshoreman and Harbor Workers Compensation Act coverage and general liability insurance premiums out of the fee paid by Bender.

6. The premiums paid by Wilks for a workers compensation policy, which included LHWCA coverage, were based in part on the fact that Bender was a shipyard engaged in maritime work and their premium rate applicable for maritime crafts such as a shipfitter. Pursuant to the agreement between Wilks and Bender, Wilks provided Bender with a certificate of insurance evidencing the purchase of workers compensation and Longshoreman Harbor Workers Compensation coverage. A factor considered in the "mark-up" to be paid by Bender to Wilks was

the cost of this insurance coverage. To date, Jarrell has received in excess of $150,000.00 in Longshoreman and Harbor Workers compensation.

7. At the time Jarrell was working for Bender, Bender retained the absolute right to determine whether or not to allow Jarrell to work at Bender when he was sent there by Wilks, and Bender further retained the right to terminate the services of Jarrell at Bender at anytime. There were no restrictions whatsoever placed on Jarrell's work at Bender by Wilks.

CONCLUSIONS OF LAW

1. Summary Judgment is properly granted as a matter of law when the plaintiff fails to present a genuine issue as to any material fact. Rule 56, A.R.C.P. Once the moving party makes a prima facie showing that no genuine issue of material fact exists, it then becomes the non-moving party's burden to offer evidence in support of its position. *Dardess v. Blasingame,* 585 So.2d 8 (Ala. 1991). The evidence a non-moving party must offer in opposition must be substantial. Ala. Code §12-21-12 (1975); *Allen v. Storie,* 579 So.2d 1316 (Ala. 1991). Substantial evidence is defined as " . . . evidence of such quality and weight that reasonable and fair minded persons in the exercise of impartial judgment might reach different conclusions as to the existence of the facts sought to be proven." *Ala. Code* §12-21-12 (as amended, 1987).

2. The Longshoreman and Harbor Workers Compensation Act, §33 U.S.C. 905(a), provides that an injured longshoreman or harbor worker (as defined by the act) may not maintain a tort action against his employer for

any negligence of the employer giving rise to the injury and that the injured employee's exclusive remedy is pursuant to the provisions of the Longshoreman and Harbor Workers Compensation Act. Similarly, *Ala. Code* §25-5-53 (as amended, 1992), provides that a claim for workers' compensation benefits shall be the sole and exclusive remedy by an employee against his employer for injuries received in a work related accident.

3. Bender maintains that Jarrell is a borrowed servant within the meaning of both the Longshoreman Act and Alabama Workers Compensation Act.

4. Whether an employee is a "borrowed employee" is a matter of law for the Court to decide. See *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 314 (5th Cir. 1969); *Melancon v. Amoco Production Co.*, 834 F.2d 1238, 1244; *Lott v. Moss Point Marine, Inc.*, 785 F.Supp. 600, 602 (S.D. Miss. 1991).

5. In determining whether Jarrell was a borrowed employee this Court must first determine which law controls that decision. although this action is pending in state court, Bender's borrowed servant argument is based upon fact that Jarrell is currently receiving benefits pursuant to the LHWCA, and Bender is seeking relief pursuant to the exclusivity of remedy provision of the LHWCA §905(a). Therefore, the Court finds that federal law provides the rules of decision on the question of whether Jarrell is a borrowed employee. See *Lott*, supra, at 602.

6. In analyzing whether an employee is a borrowed servant under the LHWCA, the Court is guided by several factors (known as the "*Ruiz* factors"). These factors are as follows:

1) Who has control over the employer [sic] and the work he is performing beyond the mere suggestion of details or cooperation?

2) Whose work is being performed?

3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?

4) Did the employee acquiesce in the new work situation?

5) Did the original employer terminate his relationship with the employee?

6) Who furnished tools and place for performance?

7) Was the new employment over a considerable length of time?

8) Who had the right to discharge the employee?

9) Who had the obligation to pay the employee?

See *Ruiz*, supra; *Melancon*, supra; *Billizon v. Conoco, Inc.*, 993 F.2d 104, 105 (5th Cir. 1993); and *Lott*, supra.

7. Consistent with the Court's previous findings of fact, the Court hereby concludes as a matter of law that Bender had control over Jarrell and the work he was performing; that it was Bender's work being performed by Jarrell at the time of the accident; that there was an agreement between Bender and Wilks in which Wilks agreed to recruit and provide temporary employees to Bender; that Jarrell acquiesced in the work situation; that Wilks did not terminate its relationship with the

employee while Jarrell was working at Bender; that, however, since the time of the injury, Jarrell is no longer employed with Wilks & Associates; that although Jarrell furnished most of his tools, Bender supplied some tools and equipment as well as the place of performance; that although the length of employment was not over a considerable length of time, this was fortuitous due to the injury (the Court therefore concludes that this factor is neutral with respect to the borrowed servant issue); that although Bender did not have the right to terminate Jarrell's employment with Wilks, Bender had the right to terminate Jarrell's services for Bender which satisfies this factor; and that Bender had the obligation to pay the employee, Jarrell, via Wilks & Associates. See, specifically *Melancon*, supra.

8. Although the agreement between Bender and Wilks stated that the Wilks' employee supplied to Bender will be considered only the employee of Wilks & Associates, the Court finds that this contractual language is insufficient to outweigh the conclusions reached as to the other factors which find in favor of borrowed servant status. The reality at the work site and the party's actions in carrying out a contract can imply, modify, alter, or waive express contract provisions. See *Melancon*, supra. The Court expressly finds that the cases cited by Jarrell, to-wit: *Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375 (5th. Cir. 1985) and *West v. Kerr McGee Corp.*, 765 F.2d 526 (5th Cir. 1985) are distinguishable on the facts given the differing contractual language involved in those cases. *Melancon*, supra.

9. The Court hereby concludes as a matter of law that Anthony Jarrell was, at the time of his injury, the

borrowed servant of Bender. Therefore, Jarrell's sole and exclusive remedy is for benefits under the Longshoreman and Harbor Workers Compensation Act.

10. Assuming, *Arguendo,* that Alabama law provides the controlling rule, this Court would conclude that Jarrell's suit is nevertheless still barred by the exclusivity remedy provisions of the LHWCA. See, *Lott,* supra. This Court would conclude, under state law analysis, that Jarrell would be deemed a borrowed servant under Alabama law based upon the Court's previous findings of fact. See, *Marlow v. Midsouth Tool Co., Inc.,* 535 So.2d 120 (Ala. 1988).

ORDER

WHEREFORE, premises considered, the Court hereby grants Bender's Motion for Summary Judgment this 1st day of May, 1995.

/s/ Chris M. Galanos
CIRCUIT JUDGE

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the **Reporter of Decision**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter**.

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1996

1950912

Ex parte Bender Shipbuilding & Repair Company, Inc.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS

(Re: Anthony Jarrell

v.

Bender Shipbuilding & Repair Company, Inc.)

(Mobile Circuit Court, CV-93-002013;
Court of Civil Appeals, 2940805)

(Released Sep. 27, 1996)

INGRAM, JUSTICE.

WRITE QUASHED AS IMPROVIDENTLY GRANTED.

Hooper, C.J., and Almon, Kennedy, and Butts, JJ., concur.

Maddox, Shores, Houston, and Cook, JJ., dissent.

HOUSTON, JUSTICE (dissenting).

I agree with Judge Thigpen's dissent. Application of the *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), factors, I think, overwhelmingly indicates a borrowed-employee status.

Maddox, J., concurs.

IN THE SUPREME COURT OF ALABAMA

September 27, 1996

1950912

Ex parte Bender Shipbuilding & Repair Company, Inc. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Anthony Jarrell v. Bender Shipbuilding & Repair Company, Inc.) (2940805) (Mobile: CV-93-002013)

CERTIFICATE OF JUDGMENT

WHEREAS, on May 7, 1996, a Writ of Certiorari to the Court of Civil Appeals was granted by this Court, and the cause was set down for submission pursuant to Rule 39, Alabama Rules of Appellate Procedure,

WHEREUPON, come the parties and the Petition for Writ of Certiorari being submitted and duly examined and understood by the Court, it is considered by the Court that the writ heretofore issued should be quashed and that the petition should be denied.

IT IS, THEREFORE, CONSIDERED AND ORDERED that the Writ of Certiorari heretofore issued to the Court of Civil Appeals be, and the same is hereby, quashed, and the Petition for Writ of Certiorari be, and the same is hereby, denied. NO COSTS TAXED.

INGRAM, J. – Hooper, CJ., Almon, Kennedy and Butts, JJ., concur; Maddox, Shores, Houston and Cook, JJ., dissent.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s)

herewith set out as same appear(s) of record in said Court.

Witness my hand this 27th day of Sept. 1996.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama